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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 550

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED; ET ALS., *Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas; JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; ET AL.

On Petition for a Writ of Certiorari to the United States States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY MEMORANDUM

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

LEONARD O. THOMAS,
J. DONALD LYSAUGHT,
ERVIN G. JOHNSTON,
518 Brotherhood Building,
Kansas City 1, Kansas,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The thrust of respondents' opposition suggests that it may be helpful if we dispose of two newly asserted defenses, and then go on to restate in capsule form the essence of the present case and the reasons why it presents an issue of sufficient public importance to call for review.

First. Respondents here raise the defense of *res judicata* (Br. Op. 8), a matter not mentioned in either opinion below (R. 39-45; Pet. App. A1-A7)—no doubt for the reason that it was not put forward in any of the three answers filed herein (R. 33-34, 34-35, 36-38) except insofar as par. 2 of the City's answer (R. 36) does so by inference. (That paragraph mentions identity of contentions but does not assert either the conclusiveness of, nor any estoppel by, the judgment.)

It should be noted that *res judicata* is specifically mentioned in Rule 8(c), F.R. Civ. P., as a defense that must be affirmatively pleaded. But, passing the question of proper pleading, it thus becomes clear that the defense of *res judicata* is an afterthought, characterized by the usual infirmities of such productions: that defense is quite without substance.

For it is well settled that the doctrine of *res judicata* is available only where the parties are the same (e.g., *Troxell* v. *Delaware, Lack. & West. R.R.*, 227 U.S. 434, 443-444), and only where a party had the opportunity to litigate the same question in a former action (e.g., *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 476). From these well settled limitations it follows that judgments in cases where a particular question could not have been adjudicated are not conclusive in later cases. E.g., *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170: "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that 'a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered.' "

Here numerous parties on both sides were not involved in the earlier action,* and none of the plaintiffs in the first action were even permitted to litigate the underlying issue, namely, the validity of the challenged annexation ordinances. The earlier case went off, first, on the holding that the plaintiffs there lacked standing even to participate in the proceeding, and, second, that the then Attorney General had an absolute and unreviewable right to dismiss the action, notwithstanding Governor Docking's order to the contrary, so as to prevent any adjudication of the basic issue. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37. The earlier decision, therefore, was in no sense a judgment on the merits. We deem it appropriate to point out that the Attorney General's motion to dismiss, the pertinent portions of which are quoted at Pet. 5-6, note 2, said nothing as to the merits, and that his first expression regarding the merits (Br. Op. 4, note 7) was not formulated until after the Kansas Supreme Court had handed down its opinion.

Respondents were therefore well advised not to rely on *res judicata* in their pleadings here (R. 33-38).

Second. A similar afterthought is presented by respondents' newly formulated assertion (Br. Op. 8) of the statute of limitations, again a defense not to be found in the pleadings (R. 33-38), and again a defense that under Civil Rule 8(c) must be affirmatively pleaded.

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* Petitioners International Harvester Company, DeLuxe Check Printers, Incorporated, Sunshine Biscuit Company, Inc., and Jones & Laughlin Steel Corporation, as well as respondents James L. Conroy, County Clerk of Wyandotte County, and The Board of County Commissioners of the County of Wyandotte, Kansas, were not parties to the earlier action.

This second afterthought likewise lacks merit. We have the word of the former Attorney General of Kansas that the statute now relied upon, Kan. G.S. 12-502(c) (1957 Supp.), does not bar the present action. He said, in the earlier case (*State ex rel.* v. *City of Kansas City,* Kan. Sup. Ct. No. 41072, Brief of John Anderson, Jr., Attorney General of the State of Kansas, pp. 38-39):

> "A dismissal without prejudice is held to be a failure otherwise than on the merits. * * * Hence if the present case be dismissed without prejudice, a new action might be commenced within a year. It is therefore incorrect to assert that the present action is the last and only opportunity to test the validity of the annexation ordinances in question."

Here the dismissal of the first case became final with the denial of certiorari on June 20, 1960 (363 U.S. 831), while the present action was filed on March 1, 1961 (R. 9), well within the one year limitation.

(For the Court's information, and as a matter of possible interest, we attach in our Appendix hereto the full argument of the former Attorney General on the unsoundness of the bar of limitations.)

Third. With the foregoing unpleaded irrelevancies out of the way, we turn to the heart of petitioners' affirmative case, which we think clear enough to permit of presentation in virtually syllogistic fashion.

1. Respondents' reliance (Br. Op. 12-15) on *Hunter* v. *Pittsburgh,* 207 U.S. 161, is wholly misplaced. That case, and those following it through *Gomillion* v. *Lightfoot,* 364 U.S. 339, all involved municipal annexations directly effected by the acts of State legislatures. Here there was not only no legislative annexation, but there could be none, inasmuch as the Constitution of Kansas specifically prohibits special municipal legislation. See

Kan. Const., Art. 2, § 17; Art. 12, §§ 1 and 5. These provisions, it has been repeatedly held, prevent the Kansas legislature from changing municipal boundaries. E.g., *City of Wyandotte* v. *Wood,* 5 Kan. 603; *Gray* v. *Crockett,* 30 Kan. 138, 1 Pac. 50; *Ritchie* v. *Mulvane,* 39 Kan. 241, 17 Pac. 830; *Levitt* v. *Wilson,* 72 Kan. 160, 83 Pac. 397; *Davenport* v. *Ham,* 72 Kan. 179, 83 Pac. 398; *Wellman* v. *City of Burr Oak,* 124 Kan. 780, 262 Pac. 607; *State, ex rel.,* v. *School District,* 140 Kan. 171, 34 P. 2d 102.

2. Since, therefore the only means of effectuating municipal annexations is through delegated power, there comes into play the principle that one whose rights are affected by a purported exercise of the delegated power, where the legislature, as here, has made only a limited and conditional grant, is entitled under the Fourteenth Amendment to a hearing as to the validity of that exercise. *Browning* v. *Hooper,* 269 U.S. 396, 405-406, and other cases cited at Pet. 15.

3. The present petitioners, however, cannot obtain a hearing under State law. They were not permitted to intervene to assert the illegality of the challenged ordinances in the first proceeding, which the Attorney General was allowed to dismiss on grounds not going to the merits. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37, certiorari denied, 363 U.S. 831. Nor can they make that challenge in the statutory proceeding normally available to recover illegal taxes paid under protest, in order to test the validity of whatever levy is ultimately authorized pursuant to the present annexation ordinances that they contend are illegal. *Smith* v. *City of Prairie Village,* 175 Kan. 469, 264 P. 2d 1053.

4. The Kansas courts being thus closed to their assertions of Federal right, it follows that the Federal courts

are open to them under the principle of *Young* v. *Ragen,* 337 U.S. 235, 238, that "it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (Italics in original.) Moreover, notwithstanding the holdings below, a State has no power to close the Federal courts to petitioners, either by State statutes (as in *Railway Company* v. *Whitton,* 13 Wall. 270, 286, and other cases cited at Pet. 12), or, as here, by State doctrines of standing to sue. Access to the Federal courts cannot be thus barred to suitors raising Federal contentions.

Fourth. The volume of municipal annexation proceedings has increased to such an extent that each year now one out of every five cities with a population of 5000 and over is endeavoring to reach out for neighboring lands (Pet. 16-17). Moreover, in nearly one fourth of the States such proceedings are not permitted to be questioned by those affected thereby (Pet. 17).

Whether considerations of municipal convenience may thus deprive individuals of any forum in which their claims of Federal right can be heard, presents, we respectfully submit, an issue of continuing public importance calling for review by this Court.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

LEONARD O. THOMAS,
J. DONALD LYSAUGHT,
ERVIN G. JOHNSTON,
518 Brotherhood Building,
Kansas City 1, Kansas,
Of Counsel.

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APPENDIX

Excerpts from the brief of Attorney General John Anderson, Jr., in the earlier case, *State of Kansas, ex rel.*, v. *The City of Kansas City*, No. 41072 in the Supreme Court of Kansas, pp. 36-39:

"The commissioner's conclusion adverse to dismissal adopts the township's contention that the one year limitation on actions to test validity of annexation provided in 1957 Supp., 12-502c having expired, the present case is the last opportunity for such test, and that as a result if this case is dismissed, said ordinances, whether good or bad, will acquire full force and effect. It is argued that on the authority of *Bowles* v. *Portelance*, 145 Kan. 940, and *Rodman* v. *Ry.*, 65 Kan. 645, G. S. 1949, 60-311, granting an additional year after failure otherwise than on the merits, has no application to actions to test annexation.

"The cases above cited do not support this contention. They were wrongful death actions authorized by G. S. 1949, 60-3203, which fixes a two year period in which only such suits may be commenced. The above cases held that Sec. 60-311 does not extend the time where such suits fail otherwise than on the merits, and correctly so. Sec. 60-3203 creates a new cause of action unknown to the common law, and prescribes its own time limitation which is a limit on the right to maintain such action.

"On the other hand, quo warranto actions such as the present case are ancient common law actions, not created by Sec. 60-3203, nor, in fact, dependent on any statute. As to common law actions, Sec. 60-311 applies in full force, the purpose of such statute being to give a right to pursue an action which has been left undetermined. (*Parker* v. *Dobson*, 78 Kan. 62, 68.) As to such statutes, 34 Am. Jur. 226, §280, states the following distinction:

"'Generally statutes permitting a new action to be brought after the expiration of the period of limitations, upon the failure of the action within that period, have been regarded as applying to actions founded upon non-statutory rights, or upon rights formerly existing independently of statutes. According to the great weight of authority such a saving clause does not apply where the action is founded wholly upon rights granted by a statute which creates a cause of action and specifies the time within which actions may be commenced, inasmuch as the time limit described in such statute is ordinarily regarded as a limitation upon the right itself so that when the time expires, the right is extinguished except as to actions then pending.'

"So far as tests of annexation ordinances are concerned, 1957 Supp., 12-502c, does not make the one year period therein stated a condition upon the right of action, but rather a condition upon which the relief sought may be granted. It does not repeal Sec. 60-311, or even limit it otherwise than to transfer such actions from the five year class of limitations to the one year class. It is a true statute of limitations, to which the rule of the wrongful death statutes does not apply.

"A dismissal without prejudice is held to be a failure otherwise than on the merits. (*McWhirt* v. *McKee*, 6 Kan. 412, 419; *Myer* v. *Wilson*, 131 Kan. 717, 720; *Standard Life* v. *Merrill*, 147 Kan. 121, 124; *Bisagno* v. *Lane*, 168 Kan. 153, 159.) Hence if the present case be dismissed without prejudice, a new action might be commenced within a year. It is therefore incorrect to assert that the present action is the last and only opportunity to test the validity of the annexation ordinances in question."